IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN

AT JODHPUR

J U D G M E N T

Shankerlal & others Vs. State of Rajasthan

D.B.CRIMINAL APPEAL NO.491/2002
against the judgment dt.21.6.2002
passed by Additional Sessions Judge, Banswara,
in Sessions Case No.61/2001.

Date of Judgment: July 14,2006

P R E S E N T

HON'BLE MR.JUSTICE N.N.MATHUR
HON'BLE MR.JUSTICE R.P.VYAS

Mr.Mridul Jain)
Mr.Anuj Sahlot) for the appellants.

Mr.J.P.S.Choudhary, Public Prosecutor.

REPORTABLE BY THE COURT: **(PER HON'BLE MR.MATHUR J.)**

1. This appeal is directed against the judgment dated 21.6.2002 passed by the learned Additional Sessions Judge, Banswara convicting the first appellant Shankerlal of offence under Section 302 IPC and sentencing him to imprisonment for life and to pay a fine of Rs.5000/- and in default, to further undergo two years' rigorous imprisonment. Appellants Suresh

alias Sanju and Lalu have been convicted of offence u/s.302/34 IPC and sentenced to imprisonment for life and to pay a fine of Rs.5000/- each and in default, to further undergo two years' rigorous imprisonment.

2. The facts as emerged during the trial are that the wife of deceased Mst.Geeta (PW 3) is the daughter of third appellant Lalu and sister of first and second appellants Shankerlal and Suresh. Geeta had married to one Ravi at Indore. Out of the said wedlock, she gave birth to three children. It is alleged that Ravi was drunkard and he used to beat Mst.Geeta, as such, she deserted him and contracted second marriage with deceased Ajai Singh Rathore. The parents and brothers were not happy with the second marriage. It is alleged that on 8.1.2001 at about 8.50 P.M., P.W.2 Abid gave an oral report to P.W.12 Rajendra Singh, ASI, to the effect that on the same day, while he alongwith PW 7 Babu were in a marriage procession and had reached near Chhatripada, they noticed deceased Ajai Singh being assaulted by the assailants Shanker, Sanju and Lalu. Appellant Shankerlal inflicted injury by a weapon known as `Gupti' on the back of deceased Ajai Singh, on account of which he fell down. They intervened and rescued him. The brother of deceased Ajai Singh viz; PW 8 Manoj Singh Rathore also arrived on the spot. They informed of the incident to PW 3 Geeta, wife of deceased Ajai

Singh. Ajai Singh was brought by them to the hospital for treatment. It was also disclosed that the marriage of Geeta with Ajai Singh was a Court-marriage. Her parents were not happy with this marriage. It was also stated that Sanju and Lalu also gave beating to deceased by kicks and fists. On this information Ex.P.3, the police registered a case for the offence u/ss.307, 341, 323 and 34 IPC. PW 12 Rajendra Singh also recorded the statement of injured Ajai Singh vide Ex.P.18. Ajai Singh succumbed to the injuries, as such, the police added the offence under Sec.302/34 IPC. After usual investigation, the police laid the chargesheet against the appellants for the offence u/s.302/34 IPC. The appellants denied the charges levelled against them and claimed trial. The prosecution adduced oral and documentary evidence to prove the charges levelled against them. The appellants denied the correctness of the evidence appearing against them. However, the learned trial Court having found the prosecution case proved, convicted & sentenced the appellants in the manner stated above.

3. Challenging the conviction, it is contended by the learned counsel for the appellants that the entire case rests on the testimony of two eye witnesses viz; PW 2 Abid and PW 8 Manoj Singh Rathore. A careful reading of the testimony of the said eye witnesses shows that they have not witnessed the incident.

Learned counsel has also criticized the alleged dying declaration recorded by the police. In alternate, it is submitted that the case against the appellant Shankerlal does not travel beyond Section 304 part II IPC and as against Suresh and Lalu, the offence u/s.323 IPC.

4. Learned Public Prosecutor has supported the judgment of the trial Court.

5. We have scrutinized the entire evidence on record and considered the rival contentions.

6. PW 1 Dr.Omprakash Upadhyaya conducted the post mortem of the dead body of deceased Ajai Singh vide Ex.P.2. He noticed the following injuries on his person:

"1. Lacerated wound 2 x 1/2cm left side forehead;

2. Lacerated wound 5 x 1 1/2cm bridge of nose;

3. Abrasion with bruise 3 x 2cm left side chin;

4. Abrasion 1 x 1/2cm Rt. side neck;

5. 2 abrasions 1 x 1/2cm on left side neck 3cm apart;

6. Abrasion 3 x 2 1/2cm Rt forearm middle 1/3rd;

7. Abrasion 2 x 1cm left side knee;

8. Abrasion 1 x 1/2cm medial malleolus Lt;

9. Abrasion 1 x 1/2cm Rt foot medially;

10. Perforating incised wound, elliptical in shape 3 x 2 1/2cm, margins were clean cut & inverted margin with bruising situated at Rt infra scapular region at mid scapular line (wound of entry). Direction of the stab wound was obliquely extending from 6th inter costal space & perforating the upper part of Rt lobe to left lobe posteriorly perforating the lung Rt lower 1/3rd, exit of stab wound at antr. Abdominal wall size 2 x 1cm left side infra region of chest below 11th internal costal rib mid clavicular line (nearly 30cm in length) There was collection of about 2 liters blood in thoracic cavity;

11. Abrasion 6 x 1/2cm left scapular region of back;

12. Abrasion 3 x 1/2cm left infra scapular region of back;

13. Abrasion 3 x 1/2cm lower region left side of back;

14. Abrasion 2 x 1cm lumbar region of back;

15. Abrasion 1 x 1/2cm Rt scapular region."

As per the doctor, all the injuries, except injury No.10, were caused by blunt weapon, which were reported to be ante mortem in nature. In his opinion, the cause of death was haemorrhagic shock as result of injuries to lever and lungs.

7. Thus, the prosecution has succeeded in establishing that Ajai Singh died of homicidal death. The prosecution has examined PW 2 Abid, PW 7 Babu alias Nazmuddin and PW 8 Manoj Singh Rathore as the witnesses of occurrence.

8. PW 2 Abid deposed that on 8.1.2001 while he alongwith his friend PW 7 Babu was passing through the locality known as Chhatripada, he noticed some people quarreling. They were assaulting Ajai Singh. Ajai Singh had fallen down. Thereafter, they went to call his brother Manoj Singh Rathore. They took Ajai Singh to hospital. He gave an oral information to the police vide Ex.P.3. He also stated that he had known Ajai Singh, as he was a regular visitor of the club. He died in the hospital. In the cross examination, he admitted that he had not seen appellant Shanker causing injury by `Gupti'. He also admitted that when he reached on the spot, all the three accused persons had run away. He also admitted that he had seen `Gupti' in the hands of Shanker. He further admitted that he had not seen appellant Shanker inflicting fatal injury. He further admitted that he had not seen appellants Sanju and Lalu assaulting the deceased. He also admitted that Ajai Singh became unconscious on the spot itself. He also admitted that he had not known the appellants prior to the date of incident. He further admitted that the names of the appellants were disclosed to him by PW 3 Geeta. Lastly, he admitted that he had not seen the appellants ever before. He stated thus:

"…..मैंने मुलजिमान को आज से पहले नहीं देखा था।"

9. PW 7 Babu alias Nazmuddin did not support the

prosecution case, as such, he was declared hostile.

10. PW 8 Manoj Singh is the brother of deceased Ajai Singh. He deposed that on 8.1.2001, while he was returning from Vaneshwar Mahadev temple and passing through Chhatripada, he witnessed all the three appellants assaulting his brother Ajai Singh. When he went near Ajai Singh to rescue, appellant Shanker inflicted injury on his back by `Gupti'. Appellant Sanju took out `Gupti' from the body of Ajai Singh and thereafter all the accused persons took their heels and escaped. He raised voice which attracted the local people. He sent the information to his Bhabhi PW 3 Smt.Geeta about the incident. Certain people brought Mst.Geeta on the spot. Thereafter, they went to the hospital and gave information to the police. He also stated that his brother Ajai Singh had married to appellant Lalu's daughter. The appellants were not in favour of their marriage. In the cross examination, he admitted that the marriage took place about three years back. He also admitted that when he reached near the deceased to intervene, accused persons had already escaped. He also stated that Lalu and Sanju were assaulting deceased by kicks and fists.

11. The major criticism against this witness is that either he

has not at all witnessed the incident or he is a chance witness. It is vehemently argued that PW 2 Abid, who is the star eye witness of the incident has, in terms, stated that after Ajai Singh had fallen, they went to call Manoj Singh, brother of deceased. He stated thus:

> "....अजयसिंह नीचे गिर गया। फिर हम अजयसिंह के भाई मनोज को बुलाने गये।"

12. Thus, it is evident that PW 8 Manoj Singh is the cooked up witness.

13. PW 3 Geeta is the wife of deceased Ajai Singh. She identified appellant Lalu as her father and two other appellants Shanker and Sanju as brothers. She also stated that they were unhappy with her and deceased Ajai Singh as they had married three years back against their wishes. She also referred to the earlier incident when Shanker had assaulted Ajai Singh. They also used to threaten him. She further stated that Abid and Babu arrived at her residence and informed about the unfortunate incident.

14. On analyzing the evidence of aforesaid witnesses, it

emerges that PW 2 Abid has not supported the prosecution version as given-out by him in the F.I.R. He has not said a word, if the fatal injury was caused by the appellant Shanker. In the cross examination, he admitted that he had not seen the appellants prior to the incident. The police did not arrange any identification parade. The witness also admitted that names of the accused persons were given by Mst.Geeta. Thus, the statement of Abid does not appear to be creditworthy.

15. PW 7 Babu alias Nazmuddin has not supported the prosecution case.

16. PW 8 Manoj Singh also appears to be a cooked up witness. PW 2 Abid has stated that after Ajai Singh had fallen, they went to call Manoj Singh. This part of the statement falsifies the statement of PW 8 Manoj Singh that he witnessed the incident. Thus, in our opinion, PW 8 Manoj Singh is wholly unreliable witness.

17. Another set of evidence on which the prosecution has relied-upon is the dying declaration Ex.P.18. PW 10 Ranjeet Singh stated that on 8.1.2001, he was posted as A.S.I. at Police Station, Banswara. At about 8.40 PM, he received a telephonic message from one Manoj Singh about the assault on Ajai Singh.

He immediately reached to the hospital alongwith the police party. He collected the necessary information and recorded the statement of Abid vide Ex.P.3. The condition of Ajai Singh was serious. He recorded his statement in the presence of PW 9 Dr.B.K.Trivedi. In the cross examination, he stated that before recording the statement, he enquired from the duty doctor as to the fitness of Ajai Singh. He also admitted that oral dying declaration Ex.P.18 was not in his handwriting but it was written by his Munshi as per the dictation given by him. He has proved the dying declaration Ex.P.18. Learned counsel has criticized the dying declaration on the ground that it has been recorded by the police.

18. It is now well settled that in a case where the statement is made before the police and the witness has succumbed to the injuries, the statement can be taken as dying declaration and is admissible under Section 32(1) of the Evidence Act. The caution is that such a dying declaration is to be approached with great circumspection. Normally, it is not prudent to base the conviction on the basis of dying declaration recorded by the Investigating Officer. The Court is required to satisfy as to whether there was sufficient opportunity to get the statement recorded by a magistrate. It has also to be ensured that person making dying declaration was in fit condition to give statement. Thus, it is for

the prosecution to prove that dying declaration is genuine, true and free from all doubts and it was recorded when the injured was in a fit state of mind.

19. In the instant case, it is evident that PW 10 Ranjeet Singh reached to the hospital immediately on receiving a telephonic information from PW 8 Manoj Singh. Looking to the condition of Ajai Singh, the police could not have waited for arrival of a magistrate. PW 9 Dr.B.K.Trivedi at the relevant time was posted as Senior Surgeon in the M.G.Hospital, Banswara. He deposed that before PW 10 Ranjeet Singh, A.S.I., recorded the statement of Ajai Singh, he had found him fit to give the statement. He made an endorsement on Ex.P.18 to the effect that the patient was fit for giving such a statement. Thus, we are of the view that the learned trial Court was right in relying on the dying declaration Ex.P.18. It was stated by deceased Ajai Singh that on the date of incident at about 8 PM, he was on the way to his in-laws house to talk to his father-in-law. On the way, appellants met him. Appellant Shanker inflicted injury on his back by `Gupti'. Others assaulted him by kicks and fists. We are of the view that the dying declaration is creditable.

20. Turning to the offence, the appellant Shanker has inflicted

a single injury, that too, on the back of deceased. If he had any intention to kill Ajai Singh, he could have repeated the injury on the vital parts of the body. Other two accused persons were not carrying any weapon with them. They assaulted him by kicks and fists. Thus, on facts, it cannot be said that the appellant Shanker intended to commit murder of Ajai Singh. At best, he can be clothed with the knowledge only. Therefore, in our opinion, he is liable to be held guilty of the offence u/s.304 part II IPC. As far as the other two accused persons viz; Lalu and Sanju are concerned, it is evident that except injury No.10 which is attributed to appellant Shanker, all the injuries on the person of deceased Ajai Singh are simple in nature. Thus, both the appellants cannot be convicted beyond offence under Section 323/34 IPC.

21. In view of the aforesaid discussion, the appeal is partly allowed. The conviction of appellant Shankerlal is altered from the offence u/s.302 to Sec.304 part II IPC. He is in jail since 9.1.2001, as such,, he has undergone the substantive sentence of five years and six months. Thus, the sentence awarded to appellant Shankerlal is reduced to the period already undergone. Appellants Suresh alias Sanju and Lalu have remained in jail for the period 9.1.2001 to 24.6.2003. They are convicted of the offence u/sec.323/34 instead of Sec.302/34 IPC. Their sentence

is reduced to the period already undergone. Appellant Shankerlal is in jail. He shall be released forthwith, if not required in any other case. Appellants Suresh alias Sanju and Lalu are on bail. Their bail bonds stand discharged.

(R.P.VYAS), J. **(N.N.MATHUR), J.**

RANKAWAT JK, PS